LEE CHOO YAM HOLDINGS SDN. BHD. & ORS.

v.

KHOO YOKE WAH & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[ORIGINATING SUMMONS NO. D2-31-198-88]
6 MARCH 1990

PARTNERSHIP: *Death of partner effect of - Section 35(1) of the Partnership Act 1961 - Existence of partnership agreement - Administratrix and administrator of deceased partners appointed as new partners - Whether continuing partnership - Construction of agreement - Onus on the defendants - Evidence - Estoppel.*

The plaintiff and the defendants are the partners of Tai Kwong Goldsmiths & Jewellers. The managing partner of the business passed away in August 1988. Another partner died in April 1988.

The last registration of business, filed and dated 15 June 1985 showed that there were 13 partners. In this case one of the partners died, his legal administratrix and administrator were taken in as partners.

This was an application by the plaintiffs by way of originating summons for an order for a declaration that the partnership and business of Tai Kwong Goldsmiths & Jewellers stands dissolved under s. 35(1) of the Partnership Act 1961.

Held:

[1] Upon the true construction of s. 35(1) of the Partnership Act 1961, the agreement made between the partners to the contrary must have been made before the death of any partner.

[2] An agreement made by the surviving partners after the death of a partner without the agreement of the deceased partner will not bind the deceased partner nor will it make the partnership a continuing partnership. With the death of a partner it would no longer be possible to adhere to the original contract, the essence of which must be that all parties to it must be alive.

[3] On the death of any partner, a partnership therefore dissolves unless there is evidence that the partners had agreed otherwise.

[4] The conduct of the parties was not sufficient to enable the Court to infer that an agreement existed for the continuation of the partnership upon the death of a partner.

[5] When the administrators joined the 'partnership' a new association came into existence and their conduct does not give rise to an estoppel.

[6] The plaintiffs application allowed, and by reason of the death of the 2 partners, the partnership and business of Tai Kwong Goldsmith & Jewellers is dissolved under s. 35(1) of the Partnership Act 1961.

[Application allowed.]

Cases referred to:

Ram Niwas Poddar v. Diwan Chand Parma Nand and Ors. [1933] AIR Lahore 618

Kesrimal & Anor. v. Dalichand & Ors. [1959] AIR Rajasthan 140

Nandlal Sohanlal, Jullundur v. The Commissioner of Income-Tax, Patiala [1977] AIR Punjab & Haryana, 320

Shivram Poddar v. Income Tax Officer [1964] AIR SC 1095

Legislation referred to:

Partnership Act 1961, s. 35(1)

For the plaintiffs/applicants - C. Das (Krishna Aiyer with him); M/s. Majid Krishna Menon & Lee
For the defendants/respondents - Sri Ram (Joseph Yeo with him); M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Anuar Zainal Abidin J:

This is an application (encl. 1) by the plaintiffs by way of originating summons for an order for a declaration that the partnership and business of Tai Kwong Goldsmiths & Jewellers stands dissolved under s. 35(1) of the Partnership Act 1961.

The third defendant does not oppose the application.

The following facts are not disputed.

The plaintiffs and the defendants are the partners of Tai Kwong Goldsmiths & Jewellers carrying on the business of goldsmiths and jewellers. Lee Choo Meng, the most senior partner was managing the business. He died in August 1988. Another partner, Ngai Ngan Tong died in April 1988.

The partnership business first started on or about 15 September 1958 with 18 partners. From the inception of the partnership until the death of Lee Choo Meng there were changes in the personnel of the firm. Some partners have died and new partners were taken in. The 1st plaintiffs became a partner of the firm only on 30 April 1982. The last registration of business filed and dated 15 June 1985 shows that there were 13 partners. Since then two partners have died. Ngai Ngan Tong who joined the partnership in 1969 died on 29 April 1988. Lee Choo Meng who joined the partnership in 1960 died on 25 August 1988.

It is also not disputed that when Lee Toh Seng who joined the partnership in 1973 died on 9 April 1982 his legal administratrix and administrator were taken in as partners.

I have set out those facts which I consider relevant.

I do not think it is necessary to set out the other facts which I feel are not relevant for the purpose of deciding this application.

The plaintiffs' application is based on one ground only. They contended that under s. 35(1) of the Partnership Act 1961 the partnership stands dissolved upon the death of any partner.

Section 35(1) of the Partnership Act, 1961 reads:

> 35(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

The meaning of the section is clear. As between the partners the partnership is dissolved by the death of a partner. However, this would be subject to any agreement to the contrary between the partners. The death of a partner in the eye of the law leads to the total dissolution

of the partnership unless partners have expressly provided to the contrary by their agreement. Hence the burden of proving the existence of such an agreement to show that the partnership is not dissolved is on the party who assert it *Ram Niwas Poddar v. Diwan Chand Parma Nand and Ors.* [1933] AIR Lahore 618. The defendants conceded that this is the correct proposition in law.

It is also conceded by both parties that it is not necessary that an agreement between the partners in this connection need be expressed, but may be implied *Kesrimal & Anor. v. Dalichand & Ors.* [1959] AIR Rajasthan 140. It may be possible to spell out such an agreement from the subsequent conduct of the surviving partners and the heirs of the deceased *supra*.

I do not completely agree with that contention. I agree that subsequent conduct of the partners may give rise to an inference that there is an agreement between the parties that the partnership should not dissolve on the death of a partner. But any inference must, to my mind, necessarily show cogent proof that such an agreement was made between the parties at the time when they first entered into the partnership. At least the agreement not to dissolve the partnership should have been made or entered into prior to the death of the partner.

In my view upon the true construction of s. 35(1) of the Partnership Act, the agreement made between the partners to the contrary must have been made before the death of any partner. An agreement made by the surviving partners after the death of a partner without the agreement of the deceased partner will not bind the deceased partner nor, in my view, will it make the partnership a continuing partnership. This is so because by the death of the partner it is no longer possible to adhere to the original contract, the essence of which must be that all parties to it must be alive.

With respect I am of the opinion that the wording of s. 35(1) of the Partnership Act 1961 leaves no doubt at all that any agreement to the contrary between the partners must be an agreement made by all the partners including the deceased. The words "every partnership is dissolved as regards all the partners" mean all the partners existing prior to death of any partner. The partner who died must be a party to the agreement that the partnership should continue in the event that death occurs to any of the partners. This agreement obviously cannot be given by the deceased partner unless it is given when he was still alive.

In my view on the death of any partner a partnership therefore stands dissolved unless there is evidence that the partners had agreed otherwise.

The onus on the defendants therefore is to prove not the existence of an agreement between the surviving partners but the existence of an agreement between all the partners including the deceased partner. The conduct of the parties to be relied upon must show clearly that the agreement between the surviving partners to continue the partnership has the stamp of agreement by the deceased partner. In the absence of such evidence the partnership shall stand dissolved by virtue of s. 35(1) of the Partnership Act 1961.

In the present case the defendants contended that there was evidence by the conduct of the surviving partners that the partners had an agreement to continue the partnership after the death of a partner.

The defendants pointed out that when one of the partners, Lee Toh Seng, died on 9 April 1982 his administrators were taken in as partners in his place. All the surviving partners including the plaintiffs agreed to this. The defendants contended that in fact the plaintiffs

raised no objection. The defendants contended that at that time the plaintiffs did not raise the issue of dissolution of the partnership. The defendants submitted that therefore the conduct of the parties raised an irresistable inference that there was an agreement between the parties that the partnership should continue even though one of the partners had died.

The evidence before the Court is that the names of the administrators of the deceased partner were submitted for registration as a partner in 1985 (encl. 10A"R4"). In the form it is stated that the date of their entry as a partner is 9 April 1982 i.e., the date when Lee Toh Seng died. The form was submitted on 15 June 1985, more than 3 years after the death of Lee Toh Seng.

It is to be noted that at the date when the administrators were presumably admitted as partners of the firm they had no letters of administration to the deceased's estate and therefore they were not the legal administrators of the estate. In fact in the form submitted in 1985 for the registration of their names it is clearly stated that they were the "intending administratrix and administrator of Lee Toh Seng." It is therefore not wrong to say that even in 1985 they were not the legal representatives of the estate of Lee Toh Seng.

The reason must be asked why Mdm. Wong Ah Lam and Mr. Lee Hoon Seng were taken into the partnership in the place of Lee Toh Seng after he died. Was there an agreement between the parties i.e., between the surviving partners and the deceased's partner that the partnership should continue upon the death of Lee Toh Seng? With respect I do not think that there is evidence to that effect. There is no evidence to show that such an agreement had been made between all the parties. The conduct of the parties here is not sufficient to enable the Court to infer that such an agreement existed. Their conduct merely shows that the surviving partners had agreed to take in the administrators of the deceased's estate to be a partner.

In my view upon the death of Lee Toh Seng the partnership stands dissolved. When the business is continued by the surviving partners a new partnership comes into being. Therefore the administrators joined in a new partnership and not a continuing partnership. A new association then comes into existence *Nandlal Sohanlal, Jullundur v. The Commissioner of Income-Tax, Patiala* [1977] AIR Punjab & Haryana, 320.

Under the ordinary law governing partnership, modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the firm and reconstitution thereof, a firm at common law being a group of individuals who have agreed to share the profits of business carried on by all or any of them acting for all, and supersession of the agreement brings about an end of the relation *Shivram Poddar v. Income Tax Officer* [1964] AIR SC 1095.

In my opinion having regards to the surrounding circumstances there is nothing either written, oral or by the conduct of the parties to justify a conclusion that there was an agreement between the partners that the partnership should continue notwithstanding the death of a partner.

Having come to that finding the issue of estoppel which the defendants submitted acted against the plaintiffs does not arise. There is nothing to show that the plaintiffs had acted in any way which may give rise to an estoppel.

As I have said earlier the administrators were admitted as new partners and not on the basis that there was an agreement to continue the partnership. In the event, the plaintiffs' conduct cannot be considered as evidence of agreement between the parties to continue with the

partnership. Their conduct does not give rise to an estoppel. There is nothing to show that when the administrators joined in the partnership they were thinking that the partnership had not been dissolved by an agreement between the partners. The evidence merely shows that they were taken in as a partner and nothing more. The inference I gather from here is that they had joined a new partnership altogether.

In my judgment, for the same reasons given above, similarly the partnership stands dissolved by the death of Ngai Ngan Tong in April 1988 and again by the death of Lee Choo Meng in August 1988.

In the event, I would allow the plaintiffs' application and order a declaration that by reason of the death of Ngai Ngan Tong and Lee Choo Meng on 29 April 1988 and 25 August 1988 respectively the partnership and business of Tai Kwong Goldsmiths & Jewellers stands dissolved under s. 35(1) of the Partnership Act 1961.

I would order that the plaintiffs be awarded costs of this application.

Also found at [1990] 1 CLJ 1152